IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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C/O TALX EMPLOYER SERVICES
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COLUMBUS OH 43216-1160

Appeal Number: 05A-UI-04348-RT
OC: 03-27-05 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wells Fargo Bank, filed a timely appeal from an unemployment insurance decision dated April 14, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Christine E. Cornwell. After due notice was issued, a telephone hearing was held on May 16, 2005, with the claimant participating. Jan McFarland, Store Manager at the employer's location on East Euclid Avenue in Des Moines, Iowa, participated in the hearing for the employer. Barb Holdenfer observed and sat in on the hearing but did not participate. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. The administrative law judge four times tried

to call the claimant at 3:01 p.m., 3:02 p.m., 3:03 p.m., and 3:04 p.m., and the claimant's line was always busy. The claimant called at 3:05 p.m. and the administrative law judge called the claimant back at 3:08 p.m. and the claimant participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time Personal Banker I from February 17, 2003 until she was discharged on March 30, 2005. The claimant was discharged for taking credit for sales made by another Personal Banker, Troy Allen. The employer has a provision in its Code of Ethics, an older copy of which the claimant received but still having the same prohibitions and which is online for the employees to access, and of which the claimant had knowledge, prohibiting the taking of credit for sales made by other team members. Mr. Allen's last day of work for the employer was March 31, 2005 and he was leaving to join another bank. Because he was leaving and the claimant was remaining, on March 24, 2005, Mr. Allen made two sales for new accounts but wrote them into the system as if they were from the claimant. Mr. Allen informed the claimant that day of what he had done. The claimant thought that it was wrong but did not know how to change the computer and did not notify management. The next day, March 25, 2005, the manager of the employer's location at East Euclid Avenue in Des Moines, Iowa, where the claimant was employed, Jan McFarland, the employer's witness, noticed the discrepancy from the manual production report of March 24, 2005 and the entries in the employer's computer system and confronted the claimant. The claimant admitted readily that she had been given two sales by Mr. Allen. Ms. McFarland said nothing to the claimant either that it was acceptable or that it was not acceptable. The claimant was not discharged at that time. The claimant worked on March 28, 2005. The claimant was off work on March 29, 2005. On that day, while the claimant was not at work, Mr. Allen assigned two more sales of accounts to the claimant. When the claimant came to work the next morning all Mr. Allen said was that she had four core for the previous day. This does indicate to the claimant that she got credits for something but it is not unusual to get some credits later. The claimant was not specifically informed that Mr. Allen had assigned to her two sales he had made the previous day. Ms. McFarland again confronted the claimant on that day and discharged the claimant. There were no other reasons for the claimant's discharge and she had received no warnings or disciplines for such behavior. Pursuant to her claim for unemployment insurance benefits filed effective March 27, 2005, the claimant has received unemployment insurance benefits in the amount of $2,020.00 as follows: $265.00 for benefit week ending April 2, 2005 (earnings $173.00); and $351.00 per week for five weeks from benefit week ending April 9, 2005 to benefit week ending May 7, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on March 30, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The basic facts are not in dispute. On March 24, 2005, a co-worker, Troy Allen, gave the claimant credit for two sales of checking accounts that he had made. Mr. Allen informed the claimant of this. The claimant was aware that it was wrong but did not know how to change it and did not notify management. The employer has rules in its Code of Ethics prohibiting taking credit for sales made by other team members. The claimant was aware of this rule. Mr. Allen credited the claimant with the two sales because he was leaving and his last day of work was

going to be March 31, 2005 and he could not take full advantage of those sales so he gave them to the claimant. The claimant learned of this on March 24, 2005, but did nothing. The employer's witness, Jan McFarland, the manager at the employer's location on East Euclid Avenue in Des Moines, Iowa, where the claimant was employed, learned of this the next day, March 25, 2005. She confronted the claimant and the claimant conceded that Mr. Allen had given her two sales. At that time Ms. McFarland said nothing to the claimant. Ms. McFarland denies that she confronted the claimant but the claimant was adamant and credible that Ms. McFarland had confronted her about the two sales and that the claimant had admitted such. The claimant was not discharged at that time nor was she given a warning. The claimant worked March 28, 2005.

The claimant was off on March 29, 2005. On that day Mr. Allen again credited the claimant with two more sales of accounts. The claimant was unaware of this until she came to work on March 30, 2005 and was confronted by Ms. McFarland and then discharged. When the claimant arrived at work on March 30, 2005, Mr. Allen told her that she had four core for the previous day but did not specifically tell the claimant that he had given her credit for the sales of two accounts he had made on March 29, 2005. The claimant was unaware of this until confronted by Ms. McFarland and discharged. Ms. McFarland's testimony to the contrary is not credible because she testified merely from hearsay as to what Mr. Allen told her. The claimant's testimony was direct and forthright. There were no other reasons for the claimant's discharge and she had received no warnings. Under the circumstances here, the administrative law judge is constrained to conclude that the claimant's acts in failing to do anything on March 24, 2005 when she was told about the two sales being credited to her, were not deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor do they evince a willful or wanton disregard of the employer's interests so as to establish disqualifying misconduct for those reasons. The claimant testified that she thought that this was probably wrong but the administrative law judge notes that the claimant did not take advantage of fictitious sales but rather had two sales given to her by a co-worker. The employer's Code of Ethics prohibiting an employee from taking credit for a sale made by another team member does not specifically address the situation in which the selling team member voluntarily gives the sale or credit for the sale to another. The administrative law judge concludes here that the claimant's failure to do anything when she learned of this on March 24, 2005 was negligence.

The claimant also was given credit for two sales by Mr. Allen on March 29, 2005 when the claimant was not at work. The claimant credibly testified that she did not learn about the credits for those sales until she was confronted by Ms. McFarland and discharged. The claimant testified that she was told by Mr. Allen that she had four core but those could have been for a number of different matters. The claimant adamantly denied that Mr. Allen told her that he had credited her with two more sales. The administrative law judge concludes that the claimant's testimony is more credible than the denial of this by Ms. McFarland because Ms. McFarland was testifying from hearsay as to what Mr. Allen had told her. The administrative law judge must conclude on the evidence here that the claimant did nothing wrong on March 30, 2005. She had no chance to inform management she had been given two sales that were not hers. The acts, therefore, of the claimant on March 30, 2005 were not deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her workers' contract of employment nor do they evince a willful or wanton disregard of the employer's interests nor are they carelessness or negligence.

The difficult question here is whether the claimant's act on March 24, 2005 was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The

administrative law judge is constrained to conclude here that her act is not such recurring negligence or carelessness so as to establish disqualifying misconduct. The claimant had received no warnings or disciplines for this behavior. These credits of sales were the only reasons for the claimant's discharge. The claimant readily conceded on March 25, 2005 when confronted by Ms. McFarland that she had been given credit for two sales made by Mr. Allen. If her behavior was so bad as to be misconduct, the claimant should have been discharged at that time or when she worked next on March 28, 2005 and she was not. The claimant was also not given any warnings for this behavior. Under the evidence here, before the claimant would be disqualified to receive unemployment insurance benefits, the administrative law judge believes that the claimant should have been given a warning for this behavior and then if it persisted, been discharged. Here, the claimant was not. Accordingly, the administrative law judge concludes the claimant's act was merely an isolated instance of negligence and not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $2,020.00 since separating from the employer herein on or about March 30, 2005 and filing for such benefits effective March 27, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 14, 2005, reference 01, is affirmed. The claimant, Christine E. Cornwell, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

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